STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 94B174(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JANET SANDOVAL,

Complainant,

vs.

OFFICE OF THE STATE AUDITOR,

Respondent.

This consolidated case came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on March 30, 1995. The hearing reconvened for nine days between June 29, 1995 and January 19, 1996. Respondent was represented by Assistant Attorneys General Laurie Rottersman and Maurice Knaizer. Complainant appeared and was represented by James Gilsdorf, Attorney at Law.

Respondent called the following witnesses: Mike Acimovic, Audit Manager; Lou Skull, Audit Manager; Ginger Miller, Program Manager; Margaret Griego, former Audit Manager; Marcia Williams, Personnel Administrator; and Timothy O'Brien, State Auditor.

Complainant testified on her own behalf and called the following witnesses: Heather Moritz, Managing Legislative Auditor; Mary Lannigan Otto, former Auditor V; Howard Atkins, former Auditor V; Alice Madden, Attorney at Law; Jerry Davies, Manager of Technical and Consulting Services Section, Department of Personnel; Ken Doby, Human Resources Specialist, Department of Personnel;

Charlene Byers, Audit Manager; and Marcia Williams, Personnel Administrator for the State Auditor's Office.

The following exhibits offered by respondent were admitted into evidence without objection: 4, 5, 9, 10, 12, 13, 15, 16, 17, 19, 20, 20A, 23, 24, 26, 27, 27A, 28, 29, 34, 36, 37, 38, 41-45, 47, 48, 51-56, 58, 92, 93, 96-100, 103, 104, 106, 109, 110, 113, 114 and 116. Admitted over objection were respondent's exhibits 1, 2, 11, 14, 22, 32, 60, 61, 79, 82-89, 102, 111, 140, 226, 227 and 228. Respondent's exhibits offered by the complainant and admitted without objection were: 30, 33, 35, 39, 46, 133, 178, 189, 199 and 212. Respondent's exhibit 175 was offered by the complainant and admitted over objection.

Complainant's exhibits B, K and N-T were admitted without objection. Exhibits H (pages 1, 4-6, 24-31, 53, 54), I and U were admitted over objection. Exhibits M and V were offered but not admitted.

MATTER APPEALED

Complainant appeals the denial of her grievance of a March 16, 1994 corrective action and the June 10, 1994 disciplinary termination of her employment. For the reasons set forth herein, the personnel actions are reversed.

ISSUES

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;

2. Whether complainant was discriminated against on the basis of age, gender or national origin, or as retaliation for the filing

of a charge of discrimination;

3. Whether there was just cause for the termination;

4. Whether the R8-3-3 meeting was properly conducted;

5. Whether complainant is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On February 15, 1995, complainant, through counsel, formally waived her right to have her discrimination claims investigated by the Colorado Civil Rights Division.

On June 23, 1995, the administrative law judge entered an order pursuant to Rule R10-4-3 consolidating Case No. 94G097, the appeal of the corrective action filed on May 10, 1994, with Case No. 94B174, the appeal of the disciplinary termination filed on June 20, 1994.

A sequestration order was entered excluding the witnesses from the hearing room until after they had testified. Excepted from this order were complainant and Ginger Miller, respondent's advisory witness. Respondent's request to also except State Auditor Tim O'Brien from the order as an indispensable witness was denied.

Respondent's June 23, 1995 motion in limine to exclude the testimony of four witnesses not listed by complainant until the filing of her amended prehearing statement was denied. Respondent's motion in limine to preclude the discovery sought in complainant's second request for production of documents was denied. The time frame for responding to discovery requests was

extended for 30 days from June 29, 1995.

At hearing on October 26, argument was heard on respondent's motion in limine filed on October 24 to limit the testimony of Jerry Davies and Ken Doby of the Department of Personnel regarding the PACE system on grounds that the PACE system was not binding on the respondent and was therefore irrelevant. Respondent's motion was denied on the merits.

FINDINGS OF FACT

1. Complainant, Janet Sandoval, a 47 year-old Hispanic female, was employed by the State Auditor's Office (SAO) from August 1985 until her dismissal on June 10, 1994. She began her employment as Auditor I and was promoted through the system until she became an Auditor V in January 1990. She holds a master's degree in public administration.

2. The SAO conducts performance and financial audits of state agencies. Tim O'Brien served as State Auditor for approximately 11 years until his resignation effective October 30, 1995. In that capacity, O'Brien was the appointing authority for all classified employees within the SAO. O'Brien was appointed by the state legislature and was not a classified employee. Deputy State Auditors Dave Barba and Larry Gupton also are not within the classified system. All other SAO employees fall under the state classified personnel system.

3. An audit begins with a planning phase followed by a survey phase, which consists of gathering information and conducting interviews. Then a scope document is prepared, which includes an estimate of how long the audit will take. The scope document is the guide for the rest of the audit. The field work phase

consists of data collection. This is followed by written findings, which identify the problems within the agency, the cause and effect of the problems, and recommendations for future action. The final audit phase is the writing of the report, which may go through several drafts before completion. Finally, there is an oral presentation before the Legislative Audit Committee, which receives the final written report.

4. The SAO did not perform annual performance appraisals of employees until 1990. Instead, the employee was evaluated per individual audit. The SAO did not use a weighted factor system.

5. Beginning in 1990, the SAO instituted a system of annual employee performance evaluations based upon the calendar year. Each auditor was assigned a mentor, who was an audit manager. The mentor would meet with the employee at least once per year for approximately fifteen minutes to conduct the annual appraisal. The annual appraisal would be based upon the individual, or "job specific", audit appraisals. The mentor would not necessarily be the person who supervised the auditor on the audit. Interim appraisals during the period of the audit were also performed. All final employee appraisals required the concurrence of the management team, consisting of the six audit managers, the personnel administrator, the two deputy state auditors and the state auditor.

6. Beginning with calendar year 1993, the SAO began using a weighted factor system on its annual employee evaluations, but not on the job specific evaluations. The weighted factor system was instituted upon the recommendation of the Department of Personnel.

7. The SAO does not have a written policy on the assignment of weights to factors. It is a common occurrence for supervisors to

use different weights. For instance, a rating of Good could fall anywhere between the range of 2.51-3.00. Ginger Miller, who was complainant's mentor, typically used a rating of 3.0 to designate Good.

8. The audit managers are evaluated by the deputies on an annual basis. For these evaluations, the job specific, not the annual appraisal form, is used. The weighted factor system is not used by the deputies to evaluate audit managers.

9. It is the SAO policy that a Needs Improvement rating automatically results in a corrective action for both job specific and annual evaluations.

10. Complainant's performance evaluation history through 1993 is as follows:

Type of AppraisalPeriod CoveredPerformance Rating

Interim08/85 - 12/85Standard

Final08/85 - 02/86Above Standard

Interim02/86 - 06/86Above Standard

Final02/86 - 10/86Above Standard

Final10/86 - 06/87Above Standard

Final07/87 - 03/88Outstanding

Final12/87 - 03/88Above Standard

Final06/88 - 09/88Outstanding

Final10/88 - 09/89Above Standard

Interim07/89 - 10//89Outstanding

Final06/89 - 01/90Outstanding

Interim01/90 - 06/90Commendable

Final01/90 - 10/90Commendable

Annual01/90 - 12/90Commendable

Final01/91 - 08/91Commendable

Final10/91 - 12/91Good

Final09/90 - 12/91Needs Improvement

Annual01/91 - 12/91Good

Final01/92 - 07/92Good

Final03/92 - 11/92Good

Final 09/92 - 01/93Commendable

Annual01/92 - 12/92Good

Interim 01/93 - 07/93Good

Final01/93 - 10/93Good

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Interim07/93 - 11/93Good

Annual01/93 - 12/93Needs Improvement

11. Audit Manager Mike Acimovic supervised complainant on an audit of the Department of Corrections (DOC) from September 1990 through December 1991. Complainant was the "in-charge" auditor, meaning that she was the direct supervisor of the other auditors working on the audit. The audit took place at the DOC central office in Colorado Springs and included visits to each correctional facility in the state. Acimovic did not conduct any interim performance appraisals during this one year and three month audit. Acimovic assigned a rating of Needs Improvement for complainant's final audit appraisal. (Exhibit 11.) Acimovic did not weight any evaluation factors. Acimovic testified that he did not conduct an interim evaluation because SAO policy was to do interims only if the audit exceeded six months duration, and he did not think that the DOC audit would last for as long as it did. Complainant filed a formal grievance of the Needs Improvement rating. Her overall annual evaluation rating for 1991 was Good.

12. Acimovic did not assign weights to the particular factors. Four factors were rated Needs Improvement; four factors were rated Outstanding. There was no performance plan.

13. The first time that complainant was advised that her work was deficient on the DOC audit was January 1992. This did not come to her attention until she saw the written evaluation. Deputy Larry Gupton sustained the evaluation at step 3 of the grievance process. State Auditor O'Brien then recommended mediation. At that time, Acimovic offered to remove the evaluation from complainant's file. Gupton would not allow this to be done.

14. Audit Manager Lou Skull supervised complainant on the Cost of Federal Programs (COFP) audit. The purpose of this audit was to determine how much it costs the state for federal programs. The audit took place between June 1993 and January 1994. Skull did an interim evaluation on November 10, 1993 for the period July 1993 until November 1993 and assigned complainant a rating of Good. (Exhibit 13.) Complainant was the in-charge auditor on this audit.

15. Complainant received another interim evaluation from Skull on February 1, 1994, which included the period of the first interim. (Exhibit 17.) The overall performance rating was Needs Improvement.

16. The final evaluation for the COFP audit was issued in May 1994 with an overall performance rating of Needs Improvement. (Exhibit 19.)

17. Skull considered certain job factors to be more important than others. The "top three", in his view, were supervision and human resources management, findings/organizing/coordinating, and written communication. Skull did not advise complainant that some factors were considered more important than others. Complainant received a rating of Unacceptable in written communication. Complainant did not agree with the overall rating and filed a grievance.

18. The Legislative Audit Committee received the final written report on the COFP audit in August or September 1994, after complainant's dismissal.

19. Skull would have given complainant a rating of Good for 1993 based upon her job

performance in 1993.

20. Skull advised complainant that he would have rated her higher on her evaluation if she had done as well on the first draft of the report as she did on the second, but that her performance rating would not be changed.

21. At the meeting between Skull and complainant concerning Skull's first interim evaluation of complainant's performance, complainant was advised of no problem areas and was left believing that her overall performance was satisfactory. They had met approximately fifteen times between July and December, and Skull did not provide any negative comments about her work during those meetings. Complainant did not receive any negative feedback until the time of the second interim evaluation on February 1, 1994. At this time she was given an overall rating of Needs Improvement.

22. Skull did not assign weights to any of the nine factors listed in the performance plan. (Exhibit 17.) Complainant was not advised that some factors carried more weight than others.

23. Complainant received an interim rating of Good and a final rating of Good on the Student FTE audit, which took place from January until October 1993, and a rating of Good on the COFP audit for work done in 1993.

24. Ginger Miller, as mentor, completed the 1993 calendar year performance appraisal for complainant, covering the period January through December 1993. She did not supervise complainant in 1993. The appraisal, dated March 9, 1994 and signed by complainant on March 11, was based on two audits: the Student FTE audit and the COFP audit. Complainant was rated Good on both of these audits in

1993. Miller gave equal weight to each audit and arrived at an overall annual rating of Needs Improvement. (Exhibit 14.)

25. When two or more audits are included in an annual evaluation, Miller assigns equal weight to each audit. Weighting is done at the discretion of the manager; other managers may weight the respective audits differently.

26. Miller prepared the 1993 annual evaluation in January 1994. On January 24, 1994, Miller recommended a Needs Improvement rating at a meeting of the management team, and the management team approved the rating. O'Brien did not attend this meeting. Complainant was not present and was not informed of the action taken by the management committee.

27. Miller advised complainant of the impendent 1993 annual Needs Improvement rating on February 14, 1994. The appraisal was not issued until March 9. Complainant received an overall rating of 2.50. A rating 2.51 would have been Good. (Exhibit 14.)

28. On March 16, 1994, Complainant was given a corrective action for poor job performance. This is the corrective action on appeal in this proceeding. (Exhibit 16.) The corrective action was issued by Larry Gupton as the appointing authority's "designee", and required complainant to: "Demonstrate a clear understanding of data/findings in audit reports. Improve writing skills to eliminate the need for major revision, to more clearly communicate/explain issues. Overall, demonstrate competency expectations for the Auditor V level."

29. A corrective action plan was developed on April 4, 1994, to be completed by May 2, subsequently extended to May 31. On May 10, complainant filed a petition for hearing on the Step 4 denial

of her grievance of the corrective action.

30. Miller testified that she recommended the corrective action based on the February 1 Needs Improvement interim evaluation of the COFP audit. On cross-examination, she testified that the corrective action stemmed from her recommendation of a 1993 annual Needs Improvement rating at the January 24 management meeting. Complainant believed at the time (and now argues) that the corrective action resulted from her 1993 annual evaluation, which was issued on March 9, 1994.

31. In her capacity of audit manager, Ginger Miller supervised complainant on complainant's next audit, the Hazardous Materials audit. Miller provided complainant with a performance plan and written expectations. (Exhibit 20A.)

32. Miller completed an interim performance appraisal for the Hazardous Materials audit for the period January through April 1994 and assigned complainant a rating of Needs Improvement. (Exhibit 20.)

33. Miller's major concerns on the Hazardous Materials audit were complainant's writing deficiencies and factual inaccuracies. Complainant was the in-charge auditor on this audit.

34. Miller assigned complainant a rating of Needs Improvement on the final evaluation for the Hazardous Materials audit, covering the period January through May 1994. (Exhibit 24.) Miller did not weight the eight factors, which she admits was an "oversight". She assigned ratings of Needs Improvement to three factors, Good to four factors, and Unacceptable in the area of written communication. If one Needs Improvement were changed to Good, the overall rating would have been Good. Complainant did not agree

with the Needs Improvement rating. Complainant disagreed with the overall Needs Improvement rating.

35. Complainant was not given a performance plan for calendar year 1994 following the 1993 Needs Improvement annual appraisal. Miller admits that this was an "oversight". SAO policy is that employees will receive a performance plan every year.

36. In Miller's view, one factual error in a report should result in a rating of Needs Improvement.

37. As the in-charge auditor on the Hazardous Materials audit, complainant directly supervised other employees. She assigned one employee a rating of Good on a performance evaluation. Miller felt that the employee should have been rated lower, and this was taken into account in assigning complainant a rating of Needs Improvement on her own evaluation.

38. Without factor weighting, Miller uses her own judgment as to the overall rating vis-a-vis the ratings assigned to the eight individual factors. The same standard is not necessarily applied to all of the employees whom she rates.

39. In April 1994, complainant met with Deputy Larry Gupton regarding her grievance of the corrective action for the Needs Improvement annual evaluation. Gupton asked her if she was making attempts to find employment elsewhere.

40. Miller frequently consulted with Gupton on how to proceed on the Hazardous Materials audit, conveying Gupton's wishes to the complainant.

41. Complainant's final performance evaluation on the Hazardous

Materials audit, dated May 31, 1994, reflected different concerns than were reflected in the previous interim evaluation. Factors which were rated as Needs Improvement on the interim became Goods on the final, and factors rated as Good on the interim became Needs Improvement on the final. The factor of written communication was rated Needs Improvement on both the interim and the final.

42. Complainant was dismissed before the completion of the Hazardous Materials audit report. Upon her dismissal, the report had not yet gone through the staff process for finding and correcting factual errors. She did not find out about the alleged factual errors until Ginger Miller testified at hearing.

43. It is not uncommon for there to be differences of opinion among staff as to how a particular audit report should be written.

44. Complainant received the final performance evaluations for the COFP audit and the Hazardous Materials audit on May 31, 1994. She grieved both ratings. (Exhibits P and Q.) A meeting was set with Lou Skull and the complainant for June 27. Complainant's employment was terminated on June 10, so she was not able to pursue these grievances.

45. Howard Atkins, a white male audit manager, received overall Needs Improvement ratings on his annual performance evaluations for 1989 and 1990. Atkins was not issued a corrective action. He was allowed to voluntarily demote to the position of Auditor V. A position was created for him at the lower level. He did not incur a salary loss. Tim O'Brien concurred in this outcome. Atkins retired in April 1994.

46. Since 1989, the Performance Appraisal for Colorado Employees

(PACE) system has required that the rating factors on employee evaluations be assigned a weight and that this weighting of factors be discussed with the employee. The PACE system was developed by the State Personnel Director.

47. By statute, employee performance evaluations must be done annually. By rule, the evaluations must be completed within thirty days of the end of the evaluation period. In the absence of a rating within that time, the employee is to be assigned a rating of Good, or higher if the previous evaluation was higher than Good.

48. The State Department of Personnel issued the report of its audit of the State Auditor's Office in March 1993. (Exhibit H.) In the report, the SAO was criticized for a lack of timeliness in performing employee performance appraisals. The report states that the SAO must complete performance evaluations within thirty days of the close of the evaluation period and to begin applying weights to the factors rated. The report states that the SAO's procedure of non-numerical weighting was not in compliance with the Director's Procedures and was unacceptable. Non-numerical weighting was not permitted subsequent to 1989.

49. Included in the above audit report is a February 22, 1993 letter from Tim O'Brien to State Personnel Director Shirley Harris indicating that the SAO would come into compliance with the requirement of the weighting of factors. (Exhibit H, Appendix C.)

50. The PACE process set forth in the PACE manual (Exhibit 133) was not promulgated by rule or statute. The intent of the PACE system is that it be binding on all agencies with classified employees. An agency is not prohibited from adding job specific factors to its appraisal form. The purpose of the PACE system is

to encourage communication between a supervisor and an employee regarding expectations, and to fairly evaluate an employee's performance. The assignment of weights establishes the relative value of each factor. Weights should be assigned at the time of the performance plan. If the factors are not weighted, it is generally presumed that all factors are of equal value.

51. According to Ken Doby, Human Resources Specialist for the Department of Personnel since 1984 and the only trainer in the PACE system, consistency in the rating system is very important. The "majority rule" should be used in assigning a final rating to an evaluation factor. For instance, when the components of a factor are three Goods and two Commendables, the overall factor rating should be Good. Doby is not aware of any state agencies that are exempt from using the PACE system.

52. According to Ken Doby's calculations, complainant's rating on the COFP audit should have been 2.8, which would be Good, not Needs Improvement. The overall annual performance evaluation rating should have been 3.0, which would be Good.

53. Doby would not arrive at the same rating as did Ginger Miller. (See Exhibit 14.) On that evaluation, complainant received a 2.50. A rating of 2.51 would have been an overall Good. Complainant was thus 1/100 of a point short of a Good evaluation.

54. The final evaluation of the COFP audit (Exhibit 19) does not give an indication of internal weighting of factors, so the factors should be weighted equally. Of the nine factors, five were Good, one was Commendable, and three were Needs Improvement. The majority rule, if applied, would result in an overall rating of Good.

55. Using the majority rule, the numeric rating for complainant's 1991 job specific evaluation on the Department of Corrections audit would be Good, not Needs Improvement. The numeric rating of 3.3 reaches into the high end of the Good range.

56. The 1993 annual performance evaluation, which complainant received on March 9, 1994, was more than 30 days past the end of the performance cycle and, according to Doby, was untimely. Therefore, the presumption is that the rating is Good. Timeliness is an element of the system, pursuant to the Rule R8-2-3.

57. According to Ken Doby, the annual performance evaluation should be based upon work performed during the specified twelve-month period and should not include the evaluation of work done before or after the evaluation time frame.

58. It is Ken Doby's opinion that after-the-fact weighting is not permitted. If an employer adopts the majority rule system, the majority rule should be applied accurately and consistently.

59. Charlene Byers, an audit manager, supervised complainant on five audits between 1988 and 1993. Byers testified that complainant was competent in all rating factors and compared favorably to other Auditor Vs. In her experience, it is always necessary to do a certain amount of rewriting of audit reports before the report is finalized.

60. Byers testified that there is variability within the SAO as to whether weights are assigned to factors. She does not know if weighting is required by the office employee evaluation policy. Byers testified that she has personal knowledge of after-the-fact weighting by some audit managers. It is her understanding that it is optional as to whether a manager puts the weight on the

performance planning form during the performance planning stage.

61. Byers preferred not to use weights on an evaluation. All factors were considered equally and were given equal weight. This was her approach to the job specific performance evaluations on audits. With respect to the annual performance evaluation, Byers used the factor weighting system. She testified that, on one occasion, she changed the weights on an employee appraisal in order to produce a particular outcome, at the request of "management". It was made clear to her that "they" wanted a Needs Improvement rating, not the Good rating she had intended to give the employee. As a result of this mandate, she had to manipulate the weights in order to arrive at a Needs Improvement annual rating instead of a Good. It was the feeling of management that one audit was more important than others and should be given more weight. Byers was not the audit manager; she completed the annual evaluation in her role as mentor. It was not noted in the performance plan of this particular employee that one audit would be considered more important than others.

62. Byers received a Needs Improvement annual appraisal rating in 1993. She was not issued a corrective action, contrary to the policy stated in the office manual. She was told by the deputies that the Needs Improvement rating was a warning that she needed to improve her performance, and that a corrective action would not add anything to the evaluation. She was told that it was not her turn to leave the office.

63. Byers has heard Deputy Gupton state at management meetings that he did not believe that complainant could perform the job of an Auditor V. He stated this at the January 24, 1994 meeting, as well as three or four other times over the preceding two years.

64. Gupton asked Byers to contact the complainant and tell her that, because Tim O'Brien was on the PERA Board, if she applied for a PERA disability her application might be looked at favorably. Byers communicated this to the complainant at Gupton's request.

65. According to Byers, the SAO audit reports often contain factual errors. It is her belief that a performance appraisal does not necessarily reflect the quality of the work being done, but rather reflects the perspective of the evaluator regarding the person being evaluated. She would not agree with a practice that calls for a Needs Improvement rating for even one factual error.

66. In 1988, a delegation agreement for decentralized management was executed by the SAO and the Department of Personnel. The agreement is still in effect. Under this agreement, the Personnel Director may review and overturn the actions of the state auditor, but has never done so with respect to the PACE system as implemented by the SAO.

67. The SAO adopted the PACE system with some modifications. The weighting system and factor areas in the PACE manual (Exhibit 133) are to be used by the SAO.

68. The SAO conducts performance evaluations on a calendar year basis, the evaluations to be completed within thirty days of the end of the calendar year. Performance planning is a requirement of the SAO as well as of the PACE system.

69. O'Brien met with complainant on April 21, 1994 in connection with complainant's grievance of the corrective action. At this meeting, O'Brien asked for more information concerning the discrimination charges, but complainant was unable to offer

specific facts to support her claims. This was the only meeting between the two to discuss complainant's job performance prior to the predisciplinary meeting of June 10, 1994.

70. In response to allegations of age, gender and national origin discrimination made by complainant in her grievances, O'Brien sought information from various staff members and uncovered no evidence of discriminatory behavior within the SAO. O'Brien also asked Madeline SaBell, the personnel administrator for the Department of Human Services, to investigate complainant's allegations. SaBell talked to complainant and others, and reported to O'Brien that she did not find any incidents of discrimination within the SAO.

71. On May 2, 1994, O'Brien issued a Step 4 decision denying complainant's grievance.

72. By letter dated June 2, 1994, O'Brien scheduled a predisciplinary meeting for June 6 to discuss complainant's job performance. O'Brien stated: "During the meeting, I will present the information that has come to my attention. This meeting is not a formal hearing but is for the purpose of gathering all pertinent information. The meeting will provide you with an opportunity to admit or refute said information and/or to provide mitigating circumstances, prior to my deciding whether disciplinary action is appropriate." (Exhibit 51.) The meeting was subsequently rescheduled at the request of complainant's attorney. (Exhibit 52.)

73. The predisciplinary meeting took place on June 10, 1994 at 11:00 a.m. Present were complainant, attorney Alice Madden, O'Brien and personnel administrator Marcia Williams. O'Brien began the meeting with a statement that the purpose was for complainant to provide him with mitigating information. In

preparation for the meeting, complainant had prepared an eight-page statement with various attachments consisting mostly of audit report drafts. Complainant intended to demonstrate to O'Brien that her drafts were similar to the final drafts and that the low performance evaluation ratings were not justified. Attorney Madden had seen the eight-page written statement but had not seen the other documents. Madden began to ask questions about the appraisal form, including how the various factors were weighted. It was her intent to show that the evaluation form was flawed and did not accurately reflect complainant's job performance. O'Brien interrupted Madden two or three times, saying that that was not the purpose of the meeting. He stated that the purpose of the meeting was for him to get mitigating information and not to answer questions about the appraisal form. He was insistent that he did not want to discuss the appraisal forms. Madden then brought out a packet of documents that included a chronological list of complainant's prior performance appraisals. Meanwhile, O'Brien started to look at the documents that complainant had given to him at the outset of the meeting. These were drafts of audit reports. O'Brien interrupted Madden by asking, "Have you seen this?" Madden, thinking that he was referring to the eight-page written statement, said that she had received it that day. O'Brien then said that if she had seen the documents, it was a violation of a state statute. Madden then realized that he was referring to the documents which had been in the possession of the complainant, and she stated that she had not seen those documents. O'Brien became very angry and talked in a loud voice, insisting that Madden had broken the law. Complainant explained that she had given the eight-page statement to her attorney but had not shown her the report drafts. Complainant then tried to explain that the draft documents she had presented to him weren't much different from the final reports. O'Brien remained very angry over what he perceived as a public disclosure of confidential

documents. It is unclear from the testimony who actually closed the meeting, but it was clear to all that any meaningful dialogue had come to a halt. They all more or less got up together in a gesture of concluding the meeting. The meeting lasted for approximately twenty minutes to one-half hour.

74. A follow-up meeting had previously been set for the afternoon of June 10. Madden could not attend that meeting and asked O'Brien at the conclusion of the morning meeting if he would call her before he made a final decision, if the afternoon meeting could not be postponed. O'Brien stated that he would not postpone the afternoon meeting, and he did not respond to Madden's request for a phone call. Madden specifically asked that she be given an opportunity to meet with O'Brien again before the final decision was made.

75. The afternoon meeting had originally been scheduled for 2:00. At 1:00, complainant received a phone call advising her that the meeting had been set back to 3:30 p.m. O'Brien testified that the delay was caused by the amount of time it took to issue complainant's final paycheck.

76. At the 3:30 meeting, O'Brien presented complainant with the letter terminating her employment. (Exhibit 53.) The meeting did not last for more than five minutes.

77. O'Brien stated in the termination letter that complainant's overall performance evaluations indicated a lack of occupational competence and that she was being dismissed for failure to comply with standards of efficient service or competence and for willful misconduct. O'Brien noted that the willful misconduct came in the form "of the violation of CRS 2-3-103.7, which stipulates misdemeanor sanctions against the knowing disclosure of an audit

report prior to official release." (Exhibit 53.)

78 . O'Brien testified that the termination decision was based on his view of complainant's job performance being substandard in the area of data collection, analysis and communication, in addition to his concern that the state statute may have been compromised. The statute prohibits the disclosure of audit reports except upon an affirmative vote of the Legislative Audit Committee.

79. At the R8-3-3 meeting, the parties did not reach a discussion of complainant's job performance issues.

80. The R8-3-3 meeting took place on a Friday. Madden asked O'Brien to wait until Monday before making a final decision in order to give her a chance to talk to him again. O'Brien testified that he decided there was no need to wait until Monday.

81. In conjunction with his position of State Auditor, O'Brien was a member of the PERA Board of Trustees for eleven years. O'Brien admits telling Deputy Larry Gupton that if complainant had a problem that they were not aware of, she needed to apply for PERA disability benefits within 90 days of her termination. O'Brien did not know of any reason why complainant might be eligible for a disability retirement. This question was not asked at the R8-3-3 meeting.

82. Complainant testified that it was August 1994 when Charlene Byers advised her that Larry Gupton suggested that she apply for a PERA disability. She did not act on this information because she had no reason to apply for a disability retirement. She had never indicated to anyone that she had such a reason.

83. On June 9, 1994, the day before the R8-3-3 meeting,

complainant contacted the person within the SAO office who reviews all audit reports and asked him if he would review her work and provide independent consultation. He agreed to do this, but complainant was dismissed the following day.

84. Complainant was employed as a word processor for a temporary agency from January to April 1995. She worked on a temporary appointment with the Division of Insurance from April to October 1995. She has not received any other offer of employment since June 1994.

DISCUSSION

A.

In this de novo disciplinary proceeding, the burden is on the agency to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause exits for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant bears the burden to prove by preponderant evidence that she was discriminated against on the basis of age, national origin or gender, and that respondent's action with respect to the corrective action was arbitrary, capricious or contrary to rule or law. The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes V. Lobato, 743 P.2d 27 (Colo. 1987).

It is the role of the administrative law judge to weigh the evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight is not quantifiable in the absolute sense and is not a

question of mathematics, but rather depends on its effect in inducing a belief. The standard that applies in this administrative setting is "by a preponderance". This standard of proof has been explained as follows:

> The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985) (emphasis supplied).

To sustain a finding of the truth of the assertions, the party with the burden of proof must do more than put the mind of the trier of fact in a state of equilibrium. It has been said:

> [T]he burden of persuasion entails more than merely producing evidence which would tend to put the court's mind in a state of equilibrium with respect to whether a certain fact exists or not and if, at the close of the evidence, this is the situation, then the decision must go against the party who has the burden of persuasion on the particular issue in question.

Johnson v. Barton, 251 F. Supp. 474, 476 (W.D. Va. 1966).

If the evidence weighs evenly on both sides, the finder of fact must resolve the question against the party having the burden of proof. People v. Taylor, 618 P.2d 1127 (Colo. 1980). See also, Charnes v. Robinson, 772 P.2d 62 (Colo. 1989).

Respondent did not satisfy its burden to prove by preponderant evidence that complainant's job performance constituted failure to comply with standards of efficient service or competence, or that complainant engaged in willful misconduct. R8-3-3(C)(1) and (2), 4 Code Colo. Reg. 801-1. Complainant's performance evaluation history does not lend itself to a conclusion that there was just cause for the disciplinary termination. Nor can it be concluded from the evidence that complainant violated the SAO confidentiality statute.

The record supports a finding that the employee appraisal system as implemented by the SAO was unevenly applied and lacking sufficiently objective standards on which to base a disciplinary termination. This is true of both the job specific and the annual evaluations. Substantial weight is given to the testimony of Ken Doby, who has participated in the development of the PACE system since 1984 and is the sole Department of Personnel trainer in the purposes and objectives of employee appraisals in the state classified system.

B.

The actions of the appointing authority at the predisciplinary meeting cannot be justified from the standpoint of a reasonable and prudent administrator. All participants in the meeting agree that the meeting was cut short and did not reach its natural conclusion. The appointing authority admitted that they did not get to a discussion of complainant's job performance. Under the circumstances, it was unreasonable for the appointing authority to refuse to once again meet with complainant's attorney prior to making a final decision. There is no evidence that an emergency existed. Complainant was not a threat to herself or others. No reason was given for the appointing authority's refusal to follow

up with complainant's counsel. There is no reason why the decision absolutely had to made in the afternoon of the day of the meeting. Complainant's request for a follow-up to the meeting was not unreasonable and should have been granted in the interests of fairness and completeness.

The predisciplinary meeting mandated by Rule R8-3-3(D), 4 Code Colo. Reg. 801-1, is designed for the exchange of information and is analogous to a sentencing hearing in a criminal context. At a sentencing hearing, the sentencing judge is required to listen to whatever the defendant has to say. The judge is not free to pick and choose what he wants to hear, or what he thinks is relevant, because the defendant has a right to allocution, which is defined as follows:

> Formality of court's inquiry of defendant as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction; or, whether he would like to make statement on his behalf and present any information in mitigation of sentence.

Black's Law Dictionary at 76 (6th ed. 1990).

The employee at a predisciplinary meeting should not be limited in any way, short of a filibuster, in presenting a case for mitigation of sanction. As a sentencing judge may have a penalty range to choose from, an appointing authority has a range of penalties (Rule R8-3-3(A)) to contemplate in imposing discipline. The alternatives must be justly balanced in view of all available information. Disciplinary termination, the death penalty of personnel actions, should not be lightly regarded.

Janet Sandoval, a nine-year employee, had a right at the R8-3-3 meeting to present her case in full, without restriction. The appointing authority could subsequently disregard or disbelieve

the complainant's statements, but he is required to listen and to candidly consider.

It was also improper for the appointing authority to take into account his perception that the confidentiality statute had been violated in making the termination decision. In order for the appointing authority to consider a possible violation of the statute in terminating complainant's employment, he would have to give notice to complainant that this issue would be taken into account. The notice of the R8-3-3 meeting included only the issue of complainant's job performance. When a new issue came to light, another meeting upon notice was called for. Complainant was not advised that a second issue would be considered, and complainant's attorney was not afforded the opportunity, which she requested, to meet again with the appointing authority, or to at least talk by phone.

C.

Complainant's 1993 annual performance evaluation was untimely and should have received a rating of Good. Director's Procedure P8-2-5(C), 4 Code Colo. Reg. 801-2; Rules R8-2-1 and R8-2-3, 4 Code Colo. Reg. 801-1. Additionally, complainant's actual job performance during the evaluation period, calendar year 1993, was rated Good. The Needs Improvement rating was consequently founded in ratings of Good. And, the delegated supervisor wrongly failed to communicate the preliminary overall performance appraisal rating to the employee prior to formal agency review of the rating. Director's Procedure P8-2-4(D), 4 Code Colo. Reg. 801-2. The Needs Improvement rating thus falls and cannot provide the necessary foundation for a dismissal.

The administrative law judge is not persuaded by the agency's

contention that audit work does not lend itself to annual employee appraisals because the work carries over from one year to the next. There is no logical reason why an employee's performance cannot be looked at over a period of twelve months, even if a particular audit is not completed in that time frame. Such a circumstance would simply be a consideration for note during the evaluation process. By its own policy, respondent is required to consider only work performed during the subject evaluation period. The lack of annual performance planning is also inexcusable. Policy 8-2-(B), 4 Code Colo. Reg. 801-1; Director's Procedure P8-2-3, 4 Code Colo. Reg. 801-2.

D.

Complainant contends that the March 16, 1994 corrective action resulted from her 1993 annual evaluation issued on March 9. Respondent's only evidence on this point is the inconsistent testimony of Ginger Miller, who testified that her recommendation of a corrective action was based on the February 1 interim evaluation on the COFP audit, but who also indicated that it was based on the 1993 annual Needs Improvement rating. The corrective action, itself, does not specify a basis. It is found that the corrective action was based on the annual appraisal and was not warranted. Even without this finding, the COFP interim evaluation, issued a week following the management team's decision to issue a Needs Improvement annual rating, is highly suspect and would not sustain a corrective action.

E.

Respondent stated in closing argument that the relevance of the

testimony of the DOC audit conducted in 1990-91 (to which complainant objected) was that the testimony showed that complainant could not see or understand that she needed to improve. There is no evidence that the appointing authority took into account the DOC job specific evaluation in concluding that complainant's job performance warranted dismissal, which would have been difficult when her overall annual rating for that year was Good. Also, there was no performance planning on this audit, no factor weighting, no interim appraisals over a period of one year and three months (contrary to SAO practice), and the evaluator ended up offering to rescind the appraisal. The testimony concerning the DOC audit was of little or no value.

F.

Section 2-3-103.7, C.R.S. (1980 Repl.Vol. and 1995 cum. supp.) provides:

> **Disclosure of reports before filing.** (1) Any state employee or other individual acting in an oversight role as a member of a committee, board, or commission who willfully and knowingly discloses the contents of any report prepared by or at the direction of the state auditor's office prior to the release of such report by a majority vote of the committee as provided in section 2-3-103 (2) is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.
>
> (2) This section shall not apply to necessary communication of employees of the state auditor's office or employees of any person contracting to provide services for the state auditor's office with those persons necessary to complete the audit report or with other state agencies involved with comparable reports.

The evidence is insufficient to establish that a violation of the above statute occurred. It is found that complainant did not

disclose the contents of the draft reports. Nonetheless, if the alleged disclosure had occurred, it is likely that the disclosure would be protected by the attorney/client privilege, given these circumstances. (Respondent's counsel had access to draft audit reports without an affirmative vote of the committee.)

G.

Complainant established a prima facie case of age, national origin and gender discrimination by showing that she is a member of each protected group, was qualified for the position and suffered an adverse employment consequence, termination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Complainant is over the age of 40 (See Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988)), Hispanic and female.

Respondent successfully rebutted this presumption of discrimination by articulating a non-discriminatory justification, poor job performance, for the allegedly discriminatory act. McDonnell Douglas, 411 U.S. at 802. Complainant did not prove by preponderant evidence that respondent's asserted reason for the termination was a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Simply proving that the employer's stated reasons for the personnel action are false does not compel a finding in favor of the employee. Complainant failed to carry her ultimate burden to prove that respondent's action was the result of intentional discrimination rather than being personally motivated. St. Mary's Honor Center v. Hicks, 509 U.S.___, 113 S.Ct.___, 125 L.Ed.2d 407 (1993).

H.

Respondent's personnel actions were groundless. The appointing authority's conduct at the prediscipliniary meeting, together with his rush to judgment, constitutes bad faith. Complainant is entitled to an award of her attorney fees and costs pursuant to § 24-50-125.5, C.R.S. of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's actions were arbitrary, capricious or contrary to rule or law.

2. Complainant was not discriminated against on the basis of age, gender or national origin, or as retaliation for the filing of a charge of discrimination.

3. There was not just cause for the termination.

4. The R8-3-3 meeting was not properly conducted.

5. Complainant is entitled to an award of attorney fees and costs.

ORDER

The corrective action and the disciplinary termination are rescinded. Complainant shall be reinstated to her former position with full back pay and benefits, less any substitute income or unemployment compensation. Respondent shall pay to complainant her incurred attorney fees and costs in accord with § 24-50-125.5, C.R.S.

DATED this _____ day of March, 1996, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1996, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Maurice G. Knaizer
Deputy Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO

_____

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.